95-4261

No. _____

Supreme Court, U.S.
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In the
SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term, 1994

CAROL RUTH DENNEY,
Petitioner,
v.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the First Appellate District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the protection from a defamation suit accorded by this court's rule in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny, should be extended to a public entity and its employees acting in their official capacities who are sued by an alleged limited public figure plaintiff and critic of the public entity's policies.

PARTIES

The following are parties to this action: Petitioner, Carol Ruth Denney and respondents, The Regents of the University of California, Daniel Boggan, Jr., Jesus Mena, Christine Helwick and Milton Fujii.

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PETITION FOR A WRIT OF CERTIORARI

Carol Ruth Denney respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California for the First Appellate District in which that court affirmed the availability of the protection of this court's ruling in *New York Times v. Sullivan* to state public entities and their employees.

OPINIONS BELOW

The opinion of the court of appeal is reported at 28 Cal.App.4th 1251 and 34 Cal.Rptr.2d 188 [App., *infra* at 4]. The opinion of the Superior Court of the State of California is unreported [App., *infra* at 1].

JURISDICTION

The court of appeal entered its judgment on September 30, 1994. The California Supreme Court denied petitioner's timely petition for review on December 22, 1994 (App. 38). Jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution which states, in pertinent part, that "Congress shall make no law . . .abridging the freedom of speech. . .or the right of people peaceably to assemble, and to petition the government for a redress of grievances" which applies to the states through the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

I. Background

This case arises from a land use controversy. In the 1960s, the University of California acquired by eminent domain a 2.8 acre parcel near its campus in Berkeley, destroyed all improvements on the property and then left it vacant for several years.

In 1969 community residents decided, rather spontaneously, to convert the vacant land into a

park.[1] Concededly, this was accomplished without the University's consent. The community developers brought trees, plants, flowers and grass and added other amenities including pathways and benches.

Then-Governor Ronald Reagan responded by declaring martial law and calling in national guard and other reinforcements. One person was shot and killed and several others were injured in police shootings during the demonstrations that followed. Ultimately, this military approach was unsuccessful.

Since that time the land has been known as "People's Park" and it remains open space, in the otherwise densely populated south campus area.

By the 1980s the Park had become a refuge for the homeless and the University declared its concern that the condition of the Park had deteriorated. The University then entered into an agreement with the City of Berkeley for joint management of the property under a five year lease arrangement.

In an effort to move the park away from homeless use and toward recreational uses that might attract students and others, the University designed a plan to build sand volleyball courts and other facilities. At the same time, the University sought to impose and enforce rules to discourage continued use by the

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The University stated that it bought the land with the intention to build student housing, but this never took place either because of a lack of funds or intense community opposition, or both.

homeless.

This scheme to gentrify the park enraged a large segment of the community.[2] The ensuing controversy culminated in street battles between demonstrators and police in the weeks that followed construction. The redwood perimeter of the newly-constructed volleyball courts was vandalized on repeated occasions.

II. Proceedings Below

In January, 1992, the University filed in the Alameda County Superior Court an action for trespass, nuisance and other torts against petitioner, three other activists, and an amorphous entity identified as the "People's Park Defense Union" alleging that the defendants had interfered with use of the Park and that they were responsible for damage to Park facilities (App. 7). The Regents sought and obtained a temporary restraining order (TRO) (*Id.*).[3]

2

Opponents criticized the University's plan because it violated the principles of "user development", open space and free speech, on which the Park was founded. User-development is the idea that the future of the Park should be determined by Park users rather than the University. Other complaints were that the proposed sports facilities would eat up precious open space already dedicated to other activities such as musical and cultural events and free speech gatherings. Critics also complained that the University's plan was little more than a veiled attack on the poor. Finally, some expressed the view that sand volleyball courts, appropriate to the environment in Newport Beach, seemed rather silly in Berkeley.

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The TRO enjoined the defendants from committing acts of vandalism, intimidating University employees, and interfering with the University's contractual relations.

The University asserted in its moving papers in support of the TRO that petitioner had scattered roses in the sand volleyball court, that she had moved a portable toilet without the Regents' permission and that she had been involved in an altercation with a volleyball court user (App. 35). In addition, the Regents accused her of heckling volleyball players.

The defendants countered that the suit was nothing more than a Strategic Lawsuit Against Public Participation (SLAPP) intended to deter the defendants and others from mounting a successful campaign against development of the Park.

On the day the suit was filed and thereafter, several University employees including its Vice Chancellor issued press releases and otherwise made public statements printed in several local newspapers and elsewhere in which they characterized petitioner and the other defendants as "perpetrators of violence" who "pose a serious threat to public safety that cannot be ignored." (App. 7-9).[4]

On February 10, 1995, the Alameda County Superior Court granted the Regents' motion for summary judgment and issued a permanent injunction. Petitioner intends to appeal.

[4] The full text of the statements attributed to respondents is set forth in the appendix at pp. 39-42).

Carol Denney and David Nadel[5] then filed this action for defamation against respondent Regents of the University of California and several of its Berkeley campus employees: Vice Chancellor, Daniel Boggan, Jr.; Public Information Officer Jesus Mena; Community Affairs Director Milton Fujii; and UC attorney, Christine Helwick, none of whom contested that they made the statements petitioner attributed to them.

Respondents moved for summary judgment claiming the protection of *New York Times v. Sullivan* 376 U.S. 254 (1964).[6] Petitioner argued in opposition to the motion that the rationale of *New York Times* does not extend to public entities and officials because the First Amendment is designed to curb rather than enhance government's already formidable power and was never intended as a safe harbor for public entities and officials who use their official positions to defame citizen-critics of government (App. 2).

The trial court rejected petitioner's claim and proceeded to find that she was a limited public figure in the controversy over People's Park (App. 1-3). The court then determined that petitioner failed to meet her burden of establishing that respondents published statements with knowledge that they were

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David Nadel is not a party to this petition.

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Respondents have not asserted at any time in this litigation that they are entitled to any privileges or immunities under state law.

false or with reckless disregard of the truth (App. 2).[7]

On appeal, petitioner renewed her argument that *New York Times* does not apply. The appellate court acknowledged that this case involved the two competing themes identified in *New York Times*: (1) the need to accommodate an unfettered exchange of ideas which the First Amendment is designed to promote; and (2) the interest of the state in affording a remedy for harm to reputation (App. 14).

However, the court of appeal also found that this case implicates another theme not present in *New York Times* which it described as "the overarching constitutional interest in protecting people from abuses of governmental power." (App. 18). This third theme creates the "constitutional conundrum" which the court of appeal acknowledges arises from an application of *New York Times* to this case (App. 27).

The court's analysis begins with an appreciation that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about

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The trial court actually granted "summary adjudication of issues" on petitioner's causes of action for defamation. Summary adjudication is the functional equivalent of the partial summary judgment in federal practice (*See* Cal. Code of Civ. Pro. § 437c). At the same time, the trial court granted judgment on the pleadings on additionally pled causes of action for violation of civil rights. The net result was that all of petitioner's claims were determined adversely to her in the trial court and an appeal was then taken from the ensuing final judgment. Petitioner did not contest on appeal the granting of the motion for judgment on the pleadings. Therefore, no issue pertaining to the ruling on the civil rights claims is before this court.

of political and social changes desired by the people" (citing *New York Times* at 376 U.S. 269) (App. 18). With the proper focus on the rights of listeners to receive information rather than on the identity of the speaker, the court concludes that it would seem irrelevant, for purposes of First Amendment applicability, whether the speaker is government or not (App. 19).

The court then observed that government has a legitimate role to play in the interchange of ideas and, in some instances, may be the only voice willing to present a particular side of a public issue (App. 18). The court commented that in the absence of governmental privileges and immunities, as in this case, the *New York Times* standard may be necessary to assure a constitutional "tit-for-tat" in accomodating the interests of the parties (App. 21).

In addressing the potential for governmental abuse of power, the court of appeal acknowledged the heightened vulnerability of a plaintiff engaged in a war of words with the government and concluded that this factor militates against application of the *New York Times* standard (App. 23).

The court also acknowledged petitioner's argument that the First Amendment "has been viewed historically as involving limitations on the government, not as a source of government rights" (App. 25). The court then questioned whether the government even needs First Amendment protection from the excesses of the community (App. 26).

Importantly, the court observed that extending

First Amendment protection to government may create a special danger that critics will refrain from exercising their First Amendment right to criticize government for fear of retaliatory defamation, thus inhibiting rather than promoting the exchange of ideas (App. 24).

The court of appeal attempts to balance these competing interests by first noting that, under California law, the liability of the University is derivative of the liability of the individual respondents and that First Amendment rights of these individuals are implicated rather than any institutional "right" of the University (App. 28-29). Such employees "should not be treated as having relinquished the protection of the First Amendment by virtue of government employment" (App. 28-29).

Since the court finds that the government has a legitimate role to play in the interchange of ideas, it should be entitled to some measure of protection in performing that role in the absence of any applicable state privileges and immunities (App. 28). Otherwise, "if government is compelled to guarantee the truth of its factual assertions on matters of public interest, its speech would be substantially inhibited, and the citizenry would be less informed". (App. 28).

Finally, the court concludes that "if the unfettered interchange of ideas is a central concern of the First Amendment, then application of the First Amendment to government speech in the context of limited protection from liability for defamation is entirely consistent with First Amendment dogma, in that it promotes government's contribution to the

marketplace of ideas." (App. 28).

In attempting to balance all three concerns: the unfettered interchange of ideas, the protection of reputation and the potential for abuse of government power, the court decided that the *New York Times* formulation achieves a satisfactory accommodation (App. 32).

REASONS FOR GRANTING THE PETITION

The published decision of the California Court of Appeal represents an unprecedented misapplication of the rule in *New York Times*. Ironically, this rule, fashioned initially to accord protection to government critics, will become a source of enhanced government power. The mere existence of such power, not to mention its foreseeable applications, will inhibit the expression of dissenting views when government -- immunized by First Amendment protection -- can resort to a defamatory counter attack against its critics, thereby quelling dissent by all except the most courageous.

This concern is more than conjectural. In this very case, in which the government sued petitioner for the torts of scattering roses and heckling volleyball players, it is legitimate to ask whether such a suit was intended to vindicate substantial rights, or calculated to inhibit free expression, peaceable assembly, and the right to petition.

When the Regents began its relentless, parallel media campaign to characterize petitioner as a threat to public safety that cannot be ignored, these same

questions are raised.

When the second highest official on the University of California at Berkeley campus refuses to dismiss the lawsuit because "we've got to wipe these guys out", "they're organizing against us" (App. 36, fn. 6), these questions are answered.

Almost anyone challenging government policy who draws attention to herself may qualify as a limited public figure subject to this perverse extension of the *New York Times* rule. This case presents an important and sensitive issue concerning the proper balance between the interests of government and its critics in debate on issues of public concern. These issues are of such import that they require a determination by this court.

Moreover, the decision of the court of appeal, although correctly identifying most of the interests at stake, fails to balance them consistently with its own reasoning. While the court acknowledges the issues of heightened vulnerability of plaintiffs in the face of government defamation and the danger of abuse of government power, it fails to account for either when it achieved virtually the same accommodation this court reached in *New York Times* where neither of these concerns was present.

Since respondents did not claim, nor did the court decide if respondents were protected by any state privileges or immunities, this case presents no dispositive questions of state law. Therefore, it is appropriate and necessary for this court to decide the federal question which is directly and unavoidably

presented.

I. The Question Presented Is Important

This case represents a radical new development, and a step over the edge from reason, in the evolution of the standard first announced in *New York Times v. Sullivan, supra*, 376 U.S. at 279-280 (1964) in which this court ruled that "a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is with knowledge that it was false or with reckless disregard for whether it was false or not."

The decision in *New York Times* achieved an accommodation between the interest of the state in protecting citizens from libel and the constitutional interest in maintaining the "vigor" and "variety" of public debate (*Id.* at 279). Accordingly, this court imposed severe restraints on public official plaintiffs in defamation cases to ensure the continued vitality of the First Amendment. Petitioner does not question the wisdom of this approach or ask this court to revisit that issue.

In *Curtis Publishing Co. v. Butts* 388 U.S. 130, 155 (1967), the *New York Times* rule was extended to cases in which the plaintiff is a public figure. Some people are deemed to be public figures for all purposes because they occupy positions of persuasive power and influence (*Gertz v. Robert Welch, Inc.* 418 U.S. 323, 345. Others become limited public figures

(for a limited range of issues) because they have thrust themselves to the forefront of particular controversies in order to influence the resolution of issues involved (*Id.* at 351).

Public figures are afforded less protection than private individuals because they can more easily counter criticism and expose the falsity of accusations made against them (*Gertz, supra* at 344). In addition, they have voluntarily assumed the risk of criticism by thrusting themselves into the forefront of controversy and therefore may be entitled to less protection than a private individual who may be caught up involuntarily in issues of public concern (*Id.* at 344-45).

All of the foregoing cases involved media defendants. Until this case, however, no court in the United States had decided that the principles which formed the basis for this court's opinions in *New York Times, Curtis,* and *Gertz* apply when the defendant is a government entity or government official.[8]

As the court of appeal acknowledged, official defamation is different from media or private defamation because the government "possesses a unique advantage over citizens in a war of words."

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This court has expressly refrained from deciding whether the *New York Times* rule applies to nonmedia defendants [*Hutchinson v. Proxmire* 443 U.S. 111, 133-134, fn. 16 (1979)] or specifically, its applicability to government entities or actors. Two lower court cases have applied the rule in cases of government defamation but the propriety of its application was not questioned in those cases. [*Anderson v. Low Rent Housing Comm.*, 304 N.W.2d 239, 247 (Iowa 1981); *McDowell v. Paiewonsky* 769 F.2d 942, 951 (3rd Cir. 1985)].

The court was "acutely mindful of the danger that government may abuse its power to speak" and that "the government is quite capable of misleading the public and defaming its citizens." (App. 31). These observations alone suggest that the *New York Times* rule may be too stringent to protect vulnerable citizens from the excesses of government speech.[9]

This is an important issue that cries for a more balanced resolution than the lower court's decision provides. In the absence of intervention by this court, that decision will remain precedent in the most populous state in the Union and may influence the development of law in other jurisdictions. A judgment that effectively deprives plaintiffs of any legal remedy to counter official defamation, except in the most egregious case, is not a sound accommodation of the interests involved. The citizenry will be reluctant to speak and its right to petition the government for a redress of grievances will be infringed.

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[9] Malice must be demonstrated by "clear and convincing" proof (*Gertz*, 418 U.S. at 342).

II. In Reaching Its Conclusion That *New York Times* Protection Was Available to Respondents, the Court of Appeal Did Not Properly Balance the Interests Involved

The court of appeal identified several issues of importance that bear on the degree of protection that plaintiffs should be afforded in defamation cases brought against the government and its agents.

The court reasoned that the "informing" function of government would be impaired unless the *New York Times* rule were upheld and further stated that the First Amendment rights of government employees would be infringed by application of any other standard. The court also expressed the view that an unfettered interchange of ideas would be thwarted. Since the lower court's resolution seems to be a product of these concerns, petitioner will address each of them below.

A. The Government's "Informing" Function

The court observed, and petitioner does not dispute, that the government has an important role to play "in informing, in educating and in persuading" (App. 19). "An approach that would invalidate all controversial government speech would seriously impair the democratic process" (Shiffrin, *Government Speech* (1980) 27 U.C.L.A. L.Rev. 565, 606). "If the government cannot address controversial topics, it cannot govern" (*Miller v. California Com. on Status*

of Women (1984) 151 Cal.App.3d 693, 701; 198 Cal.Rptr. 877). However, it does not follow from these undebatable propositions that the *New York Times* standard is necessary or appropriate to ensure that government will be capable of performing its functions. In reaching its conclusion, the court of appeal fails to acknowledge that these concerns are already addressed by state law.

The province of the various state legislatures is to enact statutes designed to avert serious impairment of the government's informing function by limiting, as appropriate, the availability of tort remedies directed to government speech. The official privilege which has been adopted in every state assures that damage suits would not otherwise "inhibit the fearless, vigorous, and effective administration of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties" (*Barr v. Matteo* 360 U.S. 564, 571 (1958) (referring to federal immunity).

California is among the states that affords protection for government speech (Cal. Civil Code § 47(a) (official duty privilege); Cal. Civ. Code § 47(b) (privilege in executive, legislative and judicial proceedings; Cal. Gov't. Code § 820.2 (discretionary immunity) . The problem, however, is that none of these privileges and immunities protects respondents from the falsehoods they published concerning the petitioner. This fact lends substance to the conclusion that nothing about this lawsuit offends any public policy which the various conditional and absolute privileges are designed to protect.

Despite the lack of defenses under state law, a California appellate court has reached out to confer on respondents the benefit of a federal rule that does not exist to assure efficiency of government operations, but rather to protect dissenters of government policies.[10] The lower court is simply incorrect when it concludes, contrary to legislative policy, that a judicially-fashioned extension of a federal rule is necessary to save the government from a speculative danger that it would be paralyzed in carrying out governmental functions.[11]

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In *New York Times* the court stated that the "privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen" for "it is as much [the] duty [of the critic] to criticize as it is the official's duty to administer" (*New York Times* at 282).

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The Court of Appeal suggested that the Director of Consumer Affairs, who is statutorily required to disseminate information concerning commercial and trade practices detrimental to consumers, might be sued, in the absence of First Amendment protection, for carrying out that function (Bus. & Prof. Code § 355(b) (App. 20-21). However, the Director would certainly enjoy the absolute official duty privilege conferred by Civil Code §47(a). Hence, he would not need First Amendment protection. In any case, the Legislature could grant him whatever immunity he would require to carrry out this informing function.

In contrast to this inapposite illustration and more pertinent to the case, the Legislature has never imposed any duty on the Regents to inform the public that persons protesting its land use policies are perpetrators of violence.

B. Unfettered Interchange of Ideas

This Court has expressed on several occasions that its central concern is not merely to provide immunity to the newsmedia but to protect the interests of the community in a free circulation of information i.e., to assure that listeners have access to "the widest possible dissemination of information from diverse and antagonistic sources" that the First Amendment is designed to protect [*See, e.g., Curtis Publishing Co. v. Butts, supra* 388 U.S. at 153; *Dun & Bradstreet, Inc. v. Greenmoss Buiders* 472 U.S. 749, 759 (1985)]. The court of appeal concludes that this right of listeners to receive information favors application of the *New York Times* standard to government defendants as well as media defendants.

However, the heightened vulnerability to government defamation of even a limited public figure plaintiff suggests that a correspondingly higher duty should be imposed on an official who occupies a position of public trust than the law now imposes on the editor of a supermarket tabloid under the standard of *New York Times*.

If, as the court of appeals opines, government today suffers at all levels from a serious credibility problem, then it seems not only fair, in the context of that heightened vulnerability, but even desirable to impose liability, at least for negligence when, as in this case, government falsely brands its critics as

criminals without affording them the benefit of a trial.[12] Such a rule would also have the salutary effect of promoting accuracy in government pronouncements and would contribute to the restoration of confidence in government.

As to the interests of the public in the fullest possible dissemination of information, the answer may lie in the proposition that the public deserves not to be misled by government officials who brand citizens carelessly, even when such officials lack provable awareness of the falsity of their statements.

Moreover, with the *New York Times* standard in place to immunize them, some irresponsible officials with an agenda of their own -- and not necessarily one that coincides with the public interest-- will have little incentive to pause for investigation before launching a defamatory attack against their critics. The stringent *New York Times* rule, which was never intended to promote good government, will only encourage public

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[12] In an analogous context, this court has ruled that reputational interests are entitled to constitutional protection and that such interests cannot be invaded by the state without notice and a hearing (*Wisconsin v. Constantineau* 400 U.S. 433 (1970) (invalidating ordinance that authorized posting of notices in retail liquor establishments identifying excessive drinkers); *Goss v. Lopez* 419 U.S. 565 (1974) (students have liberty interest in their good name which is infringed when a principal's suspends them without notice and opportunity to be heard); *Jenkins v. McKeithen* 395 U.S. 411 (1968) (interest in reputation sufficient to maintain suit against executive state commission which made findings of criminal wrongdoing without affording an opportunity to be heard); *Anti-Fascist Committee v. McGrath* 341 U.S. 123 (1951) (organizations designated by Attorney General as "communist" without affording notice and hearing).

officials to bask in self-serving ignorance, should that standard be appled to a case of officially-sanctioned defamation.

A prudent policy that takes into account the concept of a higher public duty will do more to assure that critics will continue their important work of criticizing, undeterred by the prospect of a government-sponsored character assassination campaign which *New York Times* does practically nothing to prevent.

C. Alleged Infringement of the First Amendment Rights of Government Speakers in the Absence of *New York Times* Protection

Part of the court of appeal's rationale for its extension of the *New York Times* rule to government employees stems from the proposition that such employees "should not be treated as having relinquished the protection of the First Amendment by virtue of government employment" (App. 28-29). In reaching its conclusion, the court failed to recognize that such employees do not speak only as individuals or on behalf of private institutions but with the imprimatur of state authority. It is this fact that calls into question the propriety of applying the strict *New York Times* rule to their conduct. The short answer to the court's ruling is that such employees have First Amendment rights as individuals, but not by virtue of government employment.

In California where the liability of a public entity is derivative of the liability of its employees[13], the court's ruling is tantamount to an extension of First Amendment protection to the government itself--not just the employees--since government is incapable of acting except through them.

However, the First Amendment is not designed to protect the government, but rather its dissenters. As Justice Potter Stewart has commented, "the First Amendment protects the press from governmental interference; it confers no analogous protection on the Government." [*Columbia Broadcasting v. Democratic Comm.* 412 U.S. 94, 139 (1973) (concurring opn. Stewart J.)]. Moreover, this court has ruled that the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment applies to people, not states [*Pennsylvania v. New Jersey*, 426 U.S. 660 (1976)].

In a similar vein, Professor Yudof has noted "It would be standing the world on its head to think that the extension of First Amendment rights to private sector organizations requires a constitutionalization of government expression in order to counter the distortions brought about by such private institutions." (Yudof, *When Government Speaks* at 44-45).

It is possible to draw a distinction between the publication of an alleged defamatory statement as a official act, which the rule in *New York Times* does not protect, and publication of such a statement as a

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[13] Cal. Gov't. Code § 815.2.

private act. This distinction affords public employees the same protection when they speak individually that is afforded other persons. However, when such employees project the status and prestige of public office to add weight to the credibility of their assertions, then they should be entitled to no greater protection than is accorded them under existing state privileges and immunities.

This is a workable rule that could be applied under traditional principles of agency law. An employee who speaks on an issue of public concern need only say that he is speaking for himself and not as an agent of his employer, and thereby would gain all of the protection *New York Times* affords.[14]

Such a rule is consonant with the object of protecting both the First Amendment rights of public employees and the interests of plaintiffs who are vulnerable to officially-sanctioned defamation.

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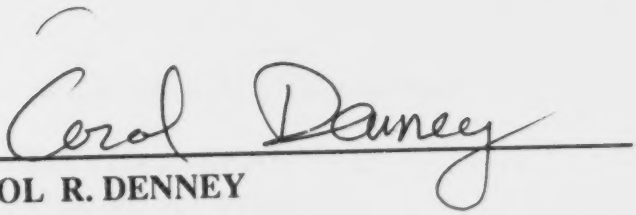
[14] The court of appeal acknowledged that the various policy considerations in this case arise from the individual defendants' conduct as University employees acting within the scope of government employment (App. 13). Vice Chancellor Boggan and Jesus Mena jointly participated in the preparation of an official University of California press release which contained alleged defamatory material (App. 7-9). Boggan also wrote letters on University of California letterhead signed "Vice Chancellor". Milton Fujii and Christine Helwick made statements to the press which were later printed in newspapers. The statements identify these individuals by title and contain no disclaimer that they expressed only private views.

CONCLUSION

Based on the foregoing, petitioner respectfully requests that the petition for a writ of certiorari be granted.

DATED: March 31, 1995.



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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA

DAVID NADEL and CAROL RUTH DENNEY
v.
REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al.

NO. 710760-1

ORDER GRANTING SUMMARY ADJUDICATION
AND
JUDGMENT ON THE PLEADINGS, ORDER
DENYING
MOTION FOR SANCTIONS.

Plaintiffs oppose the Defendants'Motion for Summary Adjudication of the third, fourth and fifth causes of action of the cross-complaint on three grounds. First, they contend they are not public figures outside the parameters of actionable defamation established by *New York Times v. Sullivan*, 376 U.S. 254 and elaborated by Reader's *Digest v. Superior Court* 37 Cal 3d 244. Second, they urge that issues of fact are presented as to the existence of malice on the part of the defendants. Third, they argue that since the First Amendment was framed as a limitation on the power of government it cannot be used as a shield by an agency of government. Plaintiffs' status as public figures is a question of law

for the court to decide *Reader's Digest* at pg. 252. Such public figures are described as having "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" *Gertz v Robert Welch Inc.* 418 U.S. 323. Defendants offer considerable evidence of the plaintiffs' voluntary activities at the forefront of the controversy over the development of "People's Park". Most of this evidence is in the form of statements by the plaintiffs themselves. Plaintiffs respond with 219 press articles in which they are not identified as leaders of the opposition to the Regents' proposals. This effort is unavailing since it is clear that press coverage alone can neither create nor negate the status of a public figure. Whatever the attitude of the press toward these plaintiffs. they have availed themselves of the public forum to further their aims and thus demonstrated the attitude of outspoken voluntarism which isthe hallmark of a limited public figure. They cannot now deny the public role they willingly assumed.

Plaintiffs have failed to carry their burden of producing "clear and convincing" evidence of "Constitutional malice" which is defined as "knowledge of falsity or reckless disregard for the truth". No admissable [sic] evidence of the subjective state of mind of the declarants has been proffered by the plaintiffs. Thus, there are no issues of fact presented.

Finally, the plaintiffs argue these "public officials officials" are not protected by the First Amendment under these circumstances. This contention presumes a dichotomy between the representative government

and individual citizens which cannot bear close scrutiny. The rule proposed by plaintiffs would render government "of the people and by the people" voiceless in the face of any dissent. Such efforts to stifle an opponent's opinions are precisely what the Amendment was designed to prevent.

ACCORDINGLY, IT IS ORDERED that all defendants' motions for summary adjudication of the third, fourth and fifth causes of action are GRANTED.

Defendants' motion for judgment on the pleadings as to the first and second causes of action is GRANTED as unopposed.

Defendants' motion for sanctions under CCP 128.5 is DENIED.

DATED: SEP 9 1993
JAMES R. LAMBDEN
Judge of the Superior Court

DAVID NADEL and CAROL RUTH DENNEY,
Plaintiffs and Appellants,
v.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Respondents.

No. A063549
Court of Appeal, First District,
Division 5.
Sept. 30, 1994.
Review Denied Dec. 22, 1994.

David J. Beauvais, Berkeley, for plaintiffs and appellants.

Paul D. Fogel, David R. Fredrickson, Thomas R. Burke, Valarie Mark, Crosby, Heafey, Roach & May, Oakland, for defendants and respondents.

KING, Associate Justice.

I. INTRODUCTION

In this case we hold that the standard of malice set forth in New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. *1255 2d 686, requiring a public official or public figure to prove knowledge of falsity or reckless disregard of the truth in order to establish a news media defendant's liability for defamation, also applies to defamation actions against government defendants.

David Nadel and Carol Ruth Denney appeal from a defense judgment in their defamation action against The Regents of the University of California and four

University employees, arising from the employees' statements concerning purportedly violent and destructive conduct by Nadel and Denney in opposing the construction of volleyball courts at People's Park in Berkeley. The court ruled that Nadel and Denney were public figures and failed to present evidence of malice. We affirm.

II. FACTS AND PROCEDURE

A. History of People's Park

People's Park, comprising 2.8 acres of open space, has been a subject of great controversy for more than 30 years. The University of California acquired the property in the early 1960s, intending to use it for student housing, but this plan went awry in the face of widespread opposition, which led to full-scale street battles between protestors and police in 1969. By the 1980s, the park had become a refuge for the homeless.

From 1987 through 1991, the University and the City of Berkeley devised a plan for joint management of the park: a portion of the property would be leased tothe city for development and maintenance as a city park, and the remainder would be developed and maintained by the University as an outdoor recreational facility. The first stage of the plan called for the University to construct two sand pit volleyball courts in a corner of the park. Construction began on July 31, 1991.

B. Opposition to the Volleyball Courts

A group of protestors, the People's Park Defense Union (hereafter Union), opposed the construction of the volleyball courts, and in a series of fliers warned of violent consequences. One flier declared, "IF IT IS CLASS WAR THEY WANT IT IS CLASS WAR THEY WILL GET," as well as "THEY TRY IT--WE RIOT!" and "We must impress upon these ruling class, selfish, and mean spirited pricks that their BMWs and Mercedes [sic] will not be safe on the streets of Berkeley nor will construction sites for condos and UC or yuppie developments. They may be capable of suppressing mass actions, but will not be able to cope with a guerrilla campaign of attrition and retribution." Another flier announced "a summer-long campaign of direct action *1256 aimed at making life impossible for those who would build on Peoples [sic] Park." Yet another warned potential contractors that their tools and equipment would be "subject to regular monkey wrenching" and their day's work would be "done in during the night."

As construction of the courts progressed to completion and public use commenced, opposition by the Union escalated, sometimes with violent results. There were incidents of vandalism and damage to the courts, confrontations between protestors and court users, and--as promised--rioting.

Nadel and Denney were members of the Union and were active and vocal opponents of the volleyball courts. Nadel spoke out against park development at city council meetings and at public demonstrations, helped organize public events in the park, wrote a

letter to the editor of a local newspaper and an "open letter" to the University and the city addressing the development issue, and spoke to print media reporters who included his comments in articles about the People's Park controversy. Denney also spoke out against park development at city council meetings and made anti-development speeches at political andcultural events. Additionally, she participated in a press conference regarding an incident at a demonstration in which she was arrested.

C. The Purported Defamation

On January 10, 1992, the University sued the Union, Nadel, Denney and two other activists for damages and injunctive relief, and obtained a temporary restraining order (TRO) enjoining the defendants from committing acts of violence and vandalism against University employees and property. During the next several months, four University employees--the individual defendants in the present defamation action--issued press releases and made statements to the press and the public regarding the University's lawsuit and the TRO, in which Nadel and Denney were characterized as perpetrators of violence and destruction of property.

On the day the University filed its lawsuit, Jesus Mena, a public information officer, issued a press release explaining that the lawsuit was "aimed at deterring the campaign of destruction and violence against University of California at Berkeley facilities, students, and employees--as well as park and community users--by the People's Park Defense Union and several of its principal members." The press

release referred to "numerous specific **191 acts of violence committed by these parties" as well as "repeated threats of violence."

Mena's press release was accompanied by a written statement by Vice-Chancellor Daniel Boggan, Jr., which included the following assertions: *1257 "During the past several months, a small group of individuals has maliciously endangered public safety through continuing acts of violence intended to destroy University property and injure or intimidate people who use University facilities. [P] ... This small band of individuals, dissatisfied with the current plans for People's Park, are [sic] using fear and violence in an attempt to impose their [sic] will on the community.... [P] The University believes that the imposition of legal sanctions against these parties will help to diminish the threat posed by tactics of intimidation, and will protect not only the safety of the public, but perhaps more importantly, the rights of all the people." (Original emphasis.)

An article in the Daily Californian dated January 27, 1992, quoted Milton Fujii, the University's community affairs director, as stating, "These are folks who have shown a repeated pattern of violent or destructive actions, (and who are) most responsible for the damage and violent acts."

An article in the East Bay Express dated March 13, 1992, quoted University attorney Christine Helwick as stating, "We are not after anyone except those who have a history of violent conduct." A subsequent article in the San Francisco Weekly quoted Helwick as stating, "There has been a

deliberate, violent campaign to hinder the university's ability to transition this property into a park."

On March 25, 1992, Vice-Chancellor Boggan issued a press release on the costs incurred by the University in the development of People's Park, in which he stated that "a few individuals have committed themselves to obstructing, through sometimes violent and destructive tactics, every attempt by the University and the City to restore a healthy environment at the park.... [P] Although small in number, those who have continually shown wanton disregard for other people's rights and well-being pose a serious threat to public safety that cannot be ignored." The press release concluded with an affirmation of the University's commitment to pursue "litigation to deter perpetrators of violent and destructive acts." On April 8, 1992, this press release was quoted in the Berkeleyan.

Finally, in a letter dated July 9, 1992, replying to a citizen's letter concerning the University's lawsuit, Vice-Chancellor Boggan said, "These individuals stated that their goal was to sabotage University facilities at People's Park and to undermine the agreement between the University and the City.... Unable to alter the consensus through debate and reasoned discourse, they resorted to the use of fear and violence to impose their will on the community." *1258

D. The Present Litigation

In 1993, Nadel and Denney sued the University, Mena, Boggan and Helwick for civil rights violations

and defamation. Fujii, against whom Nadel and Denney had filed a cross-complaint for defamation in the University's lawsuit, was later severed from that case and joined in the present action. The University and the individual defendants moved for summary adjudication as to defamation, asserting Nadel and Denney were public figures and could not demonstrate "constitutional malice"--I.E., knowledge of falsity or reckless disregard of the truth--as required by New York Times Co. v. Sullivan, supra, 376 U.S. at pages 279-280, 84 S.Ct. at page 726. [1] The defendants also moved, unopposed, for judgment on the pleadings on the civil rights claims.

The court granted summary adjudication and judgment on the pleadings, and rendered a defense judgment. In a written order, the court explained that Nadel and Denney were limited purpose public figures by virtue of having "thrust themselves to the forefront" of the People's Park controversy (Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 345, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789) and had **192 failed to produce evidence of constitutional malice.

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The parties employ, and we adopt, the term "constitutional" malice in order to distinguish the New York Times definition of malice from common law malice (see, e.g., Civ.Code, s 3294, subd. (c)(1)).

III. DISCUSSION

A. Applicability of New York Times Standard

The primary claim asserted by Nadel and Denney is that a government defendant in a defamation action is not protected by the First Amendment, and hence the New York Times standard of constitutional malice is inapplicable. Their brief argues that the First Amendment "exists not to protect government but especially to protect its dissenters" and "is designed to curb, not enhance, government's already formidable power." This is an issue of first impression.

Nadel and Denney also contend they were not limited purpose public figures and produced evidence of constitutional malice. Before reaching those issues, we must first decide whether they are germane at all--i.e., whether the New York Times standard, which poses them, applies in the present case.

*1259 We use the terms "government" and "government defendant" throughout this opinion to refer to both a public entity [2] and its employees

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The University of California is a "public trust ... with full powers of organization and government...." (Cal. Const., art. XI, s 9, subd.(a).) Its regents "have been characterized as 'a branch of the state itself' (Pennington v. Bonelli (1936) 15 Cal.App.2d 316, 321 [59 P.2d 448]) or 'a statewide administrative agency' (Ishimatsu v. Regents of University of California

III. DISCUSSION

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within the scope of their employment. Under California law, a public entity may be held vicariously liable for the conduct of its employees acting within the scope of their employment, but only to the extent that the employees may be held liable. (Gov.Code § 815.2, subd. (a); Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal.App.3d 814, 819; 131 Cal.Rptr. 854.) The University's liability is dependent upon the liability of the individual defendants--so that if New York Times protection applies to the individual defendants, it necessarily extends to the University. Thus, in the context of this case, when we refer to conduct by "government" and "government defendants," we are actually referring to the conduct of the individual University employees, from which any liability of the University is derivative. The various policy considerations implicated in this case arise from the individual defendants' conduct as University employees acting within the scope of their government employment, not from the University's institutional conduct.

316, 321 [59 P.2d 448] or 'a statewide administrative agency' (Ishimatsu v. Regents of the University of California (1968) 266 Cal.App.2d 854, 864 [72 Cal.Rptr. 756]}." (Regents of the University of California v. City of Santa Monica (1978) 77 Cal.App.3d 130, 135, 143 Cal.Rptr. 276.)

1. Decisional background

Our analysis begins with an overview of the New York Times standard, its subsequent development, and the extent to which it remains undeveloped.

The United States Supreme Court held in New York Times Co. v. Sullivan, supra, 376 U.S. at pages 279-280, 84 S.Ct. at page 726, that the constitutional guarantee of freedom of speech requires "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The Court's primary rationale was that a contrary rule compelling a critic of official conduct to guarantee the truth of factual assertions would inhibit the "vigor" and "variety" of public debate. (Id. at p. 279, 84 S.Ct. at p. 725.) Subsequent decisions explained that the creation of the New York Times standard of malice represents an "accommodation" between the constitutional interest in promoting unfettered debate on public issues and the limited state interest in protecting citizens from libel. (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 343, 94 S.Ct. at p. 3008; Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 153, 87 S.Ct. 1975, 1990-91, 18 L.Ed.2d 1094.)

*1260 The plaintiff in New York Times was a public official. In Curtis Publishing Co. v. Butts,

supra, 388 U.S. at page 155, 87 S.Ct. at page 1991, the Supreme Court extended the New York Times rule to cases where the plaintiff is a public figure. In Gertz v. Robert **193 Welch, Inc., supra, 418 U.S. at page 345, 94 S.Ct. at page 3009, the Supreme Court described two types of public figures: "Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." The latter become public figures "for a limited range of issues." (Id. at p. 351, 94 S.Ct. at p. 3013.)

Each of these cases involved *news media defendants*. The Supreme Court has never said whether the New York Times rule applies in litigation by a public official or public figure against an individual defendant who is not a member of the news media. In fact, the Court has expressly refrained from deciding that issue. (Hutchinson v. Proxmire (1979) 443 U.S. 111, 133-134, fn. 16, 99 S.Ct. 2675, 2687, fn. 16, 61 L.Ed.2d 411.)

Numerous state courts have held, as a general proposition, that the New York Times rule does indeed apply to nonmedia defendants, usually on the theory that there is no basis for affording greater protection to the media than to ordinary citizens. (E.g., Anderson v. Low Rent Housing Com'n, etc. (Iowa 1981) 304 N.W.2d 239, 247; VandenToorn v.

Bonner (Mich.App.1983) 342 N.W.2d 297, 301-302 [129 Mich.App. 198]; Britton v. Koep (Minn.1991) 470 N.W.2d 518, 521; Casso v. Brand (Tex.1989) 776 S.W.2d 551, 554; see Annot., Defamation: Application of New York Times and related standards to nonmedia defendants (1985) 38 A.L.R.4th 1115.) This includes California. In Miller v. Nestande (1987) 192 Cal.App.3d 191, 200, 237 Cal.Rptr. 359, the court concluded: "Whether criticism of public officials is published by the media or disseminated by individuals, we hold it is protected by the constitutional standard expressed in New York Times." (Fn. omitted.) This approach finds support from Justice William J. Brennan, Jr., who observed in 1985 that "at least six Members of this Court ... agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." (Dun & Bradstreet, Inc. v. Greenmoss Builders (1985) 472 U.S. 749, 783-784, 105 S.Ct. 2939, 2958, 86 L.Ed.2d 593 (dis. opn. of Brennan, J.).)

No court, however, has decided the specific question whether the New York Times standard applies to a defendant that is not only not a member of *1261 the news media, but is a governmental entity or public official.[3] This may be because in many (if not

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The defendants in Anderson v. Low Rent Housing Com'n, Etc., supra, 304 N.W.2d 239, were a public

most) cases of purported defamation by the government, some statutory or common law privilege or immunity will apply. (See, e.g., Civ.Code, s 47, subds. (a) [privilege in discharge of official duty] & (b) [privilege in legislative, judicial, or other official proceeding]; Gov.Code, s 820.2 [immunity for discretionary act of public employee].)

The present case requires a resolution of that specific New York Times question. The defendants claim no statutory privilege or immunity, and case law suggests none is applicable here. (See Sanborn v. Chronicle Pub. Co. (1976) 18 Cal.3d 406, 412-415, 134 Cal.Rptr. 402, 556 P.2d 764 [no official duty privilege or discretionary act immunity where county clerk made defamatory statements to newspaper reporter]; Toney v. State of California (1976) 54 Cal.App.3d 779, 792-793, 126 Cal.Rptr. 869 [college's decision to issue press release an immune discretionary act, but timing, content and manner of release a nonimmune "operational" implementation of policy]; see also Susan A. v. County of Sonoma

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agency and public employee; the court held the New York Times standard "applies to both media and nonmedia defendants" (id. at p. 247), but did not address or decide the more specific question whether New York Times applies to a nonmedia government defendant. (See also McDowell v. Paiewonsky (3d Cir.1985) 769 F.2d 942, 951 [applying New York Times in defamation action against legislator without acknowledging or deciding applicability issue].)

(1991) 2 Cal.App.4th 88, 93-97, 3 Cal.Rptr.2d 27.)

2. Competing interests

In deciding this issue, we are compelled to pursue an "accommodation" similar to that achieved by New York Times and its progeny. **194 In doing so, we confront the two competing themes underlying New York Times-- the First Amendment right of the people to the unfettered interchange of ideas, versus the state interest in protecting citizens from libel--plus a third theme, the overarching constitutional interest in protecting people from abuses of governmental power.

a. Unfettered interchange of ideas

On the one hand, the United States Supreme Court has repeatedly stressed that the First Amendment " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " (New York Times Co. v. Sullivan, supra, 376 U.S. at p. 269, 84 S.Ct. at p. 720, quoting Roth v. United States (1957) 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498; accord, e.g. Dun & Bradstreet, *1262 Inc. v. Greenmoss Builders, supra, 472 U.S. at p. 759, 105 S.Ct. at p. 2945; Connick v. Myers (1983) 461 U.S. 138, 145, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708.) The central concern is not simply the right of the news media to immunity, but "the interests of the community in free circulation of information" (Curtis

Publishing Co. v. Butts, supra, 388 U.S. at p. 153, 87 S.Ct. at p. 1990, emphasis added)--that is, "the rights of listeners to 'the widest possible dissemination of information from diverse and antagonistic sources.' " (Dun & Bradstreet, Inc. v. Greenmoss Builders, supra, 472 U.S. at p. 783, 105 S.Ct. at p. 2958, emphasis added (dis. opn. of Brennan, J.), quoting Associated Press v. United States (1945) 326 U.S. 1, 20, 65 S.Ct. 1416, 1424-25, 89 L.Ed. 2013.) "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source...." (First National Bank of Boston v. Bellotti (1978) 435 U.S. 765, 777, 98 S.Ct. 1407, 1416, 55 L.Ed.2d 707.)

With the proper focus on the rights of listeners to receive information rather than on the identity of the speaker, it would seem irrelevant, for purposes of First Amendment applicability, whether the speaker is media or not, and government or not. This point favors application of First Amendment protections, and hence the New York Times standard, to government defendants, just as it has been relied upon to favor application of the standard to nongovernment nonmedia defendants. (E.g., Miller v. Nestande, supra, 192 Cal.App.3d at p. 198, 237 Cal.Rptr. 359.)

Moreover, a persuasive case can be made that government has a legitimate role to play in the interchange of ideas. "Government has legitimate interests in informing, in educating, and in persuading. If government is to secure cooperation

in implementing its programs, if it is to be able to maintain a dialogue with its citizens about their needs and the extent to which government can or should meet those needs, government must be able to communicate. An approach that would invalidate all controversial government speech would seriously impair the democratic process." (Shiffrin, Government Speech (1980) 27 U.C.L.A. L.Rev. 565, 606 (hereafter Shiffrin); see also Tribe, American Constitutional Law (2d ed. 1988) p. 807 [government can "add its own voice to the many that it must tolerate, provided it does not drown out private communications"]; Miller v. California Com. on Status of Women (1984) 151 Cal.App.3d 693, 701, 198 Cal.Rptr. 877 ["If the government cannot address controversial topics it cannot govern."].)

Even the preeminent critic of unrestricted government speech, University of Texas Professor Mark G. Yudof (see post, at pp. 195-196), concedes that "government is sometimes uniquely situated to gather and disseminate particular types of information. And in some cases governments may be *1263 virtually the only entities with resources willing to present a particular side of a public issue." (Yudof, When Government Speaks (1983) p. 46 (hereafter Yudof).)

For example, in California, the Director of the Department of Consumer Affairs is statutorily required to disseminate to the public information concerning "[c]ommercial and trade practices which are detrimental to consumers" (Bus. & Prof.Code, s

335, subd. (b)) and "[g]oods and services which are unsafe, unhealthful or inimical to the general welfare of consumers" (Bus. & Prof.Code, s 335, subd. (c)). In certain situations, the Department of Consumer Affairs might be uniquely situated to acquire such information, yet in **195 carrying out the informing function--e.g., apprising the news media of detrimental trade practices by specific individuals--might invite a defamation lawsuit absent First Amendment protection. Withholding the New York Times standard--i.e., compelling the agency to guarantee the truth of factual assertions--could inhibit the agency's performance of its informing function, to the ultimate detriment of consumers.

A secondary rationale of the New York Times decision was that because statements by public officials are generally protected by conditional immunity, i.e., absent malice, "[i]t would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." (New York Times Co. v. Sullivan, supra, 376 U.S. at pp. 282-283, 84 S.Ct. at p. 727.) The Court characterized its newly-created standard as "appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen." (Id. at p. 282, 84 S.Ct. at p. 727, original emphasis.) This constitutional tit-for-tat is absent where, as is evidently the case here, the government defendant is not protected by statutory privileges and immunities. Thus, it makes sense to extend the New York Times standard to government defendants in

such situations, in order to maintain the balance sought by the Supreme Court in creating that standard.

b. Protection of vulnerable citizens from defamation

On the other hand, in deciding when to apply the New York Times standard, the United States Supreme Court has focused on the relative vulnerability of the plaintiff to injury from defamation. The Court has explained that public officials and public figures are not especially vulnerable to defamation by the news media, and thus are less in need of protection (i.e., the New York Times standard applies), because they "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than *1264 private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 344, 94 S.Ct. at p. 3009, fn. omitted.) Relying in part on the increased vulnerability of private persons to injury from media defamation, the Court concluded, "Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by New York Times." (Id. at p. 348, 94 S.Ct. at p. 3011.)

If a plaintiff's relative vulnerability is a proper focus of First Amendment analysis, it works against application of the New York Times standard to government defendants. This is because government--federal, state, and perhaps to a lesser extent local--possesses a unique advantage over the individual citizen in a war of words. "One need only notice the ready access of government officials to the mass media, the franking privilege, the constant stream of legislative and executive reports and publications, and the massive system of direct grants and indirect subsidies to the communications process (including federal financing of elections) to recognize that speech financed or controlled by government plays an enormous role in the marketplace of ideas." (Shiffrin, supra, at p. 569, fns. omitted.) Professor Yudof warns, "Expression by government is critical to democratic processes, but the power of governments to communicate is also the power to destroy the underpinnings of government by consent. The power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime." (Yudof, supra, at p. 42.) To the latter list can be added the power *to defame*.

The extent of this concern is debatable in light of general post-Watergate skepticism about anything the government has to say. One commentator argues, "Because an enormous quantity of antigovernment communications is available, and because almost no segment of the media seems unwilling to criticize the government when the occasion arises, it is unlikely

that government speech has any special persuasive powers by virtue **196 of its governmental origins. On the contrary, antigovernment biases may be so great, particularly with reference to the veracity of political leaders, that much government speech may encounter a public strongly predisposed to disbelief." (Schauer, Is Government Speech a Problem? (1983) 35 Stan.L.Rev. 373, 381.) And a similar claim of plaintiff vulnerability could be made as to any "big media" defendant. (See Tribe, American Constitutional Law (2d ed. 1988) p. 809, fn. 16.)

But while public suspicion of government has certainly increased in the past few decades, we believe that government speech, imbued as it is with *1265 the imprimatur of state authority, still retains a special force that media speech lacks. This is no less true--the impact upon the plaintiff is the same--where, as here, the government speaks not institutionally but through the voice of its employees acting within the scope of their employment, a prerequisite for public entity liability under Government Code section 815.2 (see ante, p. 192). This concern must be accommodated in addressing the issue of government liability for defamation.

Moreover, if citizens are indeed more vulnerable to government defamation because of the unique power and authority of the state, there may be a special danger that they will refrain from exercising their First Amendment right to criticize government, for fear of retaliatory defamation--with the result that the interchange of ideas is inhibited. This danger,

however, is far greater where government is conferred with absolute privilege (see Barr v. Matteo (1959) 360 U.S. 564, 584-585, 79 S.Ct. 1335, 1346-47, 3 L.Ed.2d 1434 (dis. opn. of Warren, C.J.)) than where, as here, we consider conferring what is in effect a conditional privilege dependent on the absence of constitutional malice. Government will be less likely to retaliate if malicious defamation is actionable than if no defamation is actionable.

c. Impropriety of government invoking First Amendment

There is a third concern here, not implicated in New York Times and its progeny--the notion asserted by Nadel and Denney that the First Amendment does not protect government from its citizens, but only citizens from government.

Simple as this notion appears, it has considerable merit, as well as persuasive defenders. Professor Yudof, a forceful advocate for limiting the extension of First Amendment protections to government speech, has argued, "The First Amendment has been viewed historically as involving limitations on government, not as a source of government rights. Constitutional rights like those embodied in the Bill of Rights have not been extended to government bodies, but only to individuals and groups within the private sector.... It would be standing the world on its head to think that the extension of First Amendment rights to private sector organizations requires a constitutionalization of government

expression in order to counter the distortions brought about by such private institutions." (Yudof, supra, at pp. 44-45, fns. omitted.) Similarly, Justice Potter Stewart has commented, "The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government." (Columbia Broadcasting v. Democratic Comm. (1973) 412 U.S. 94, 139, 93 S.Ct. 2080, 2104-05, 36 L.Ed.2d 772, original emphasis (conc. opn. of Stewart, J.).)

*1266 Moreover, as a practical matter, government may not have an overwhelming need for First Amendment protection. "Governments, particularly the federal government, are not fledgling communicators, needing protection from the community's excesses; they may pose more of a threat than do corporations. The emasculation by state or federal courts of the government's power to communicate, or self-emasculation of these powers by other branches of government, is unlikely. Policy reasons may warrant protection of government speech for the good of all. But it is inconceivable that governments should assert First Amendment rights antagonistic to the interests of the larger community." (Yudof, supra, at p. 45, fn. omitted.)

The overarching constitutional focus on protecting citizens from abuses of government power, rather than protecting government **197 from its citizens, is a substantial counterbalance against the argument that the First Amendment purpose of assuring unfettered interchange of ideas favors application of

First Amendment protections, and hence the New York Times standard, to government speech. In Professor Yudof's words, "The 'right to know' formulation simply obfuscates the problem of how and why governments should have rights against the community under a First Amendment designed to limit government powers." (Yudof, supra, at p. 47.)

3. Striking a balance

Is there a way out of this constitutional conundrum? Can we strike a balance that accommodates all three of these competing concerns? We believe so.

We begin with the proposition that any potential liability of government for publishing a defamatory statement is itself a check on government abuse of its power to defame. Professor Yudof has himself characterized "laws ... holding government or its officers liable for defamation" as one source of protection "from overzealousness in government speech." (Yudof, supra, at p. 188.) Thus, even if the New York Times standard is applied to government speech, governments still face the threat of liability (assuming no privilege or immunity) for defamatory speech that is constitutionally malicious. This threat, though limited in practical application, provides at least a baseline level of protection to a vulnerable citizenry from abuse of government power.

Next, if government has a legitimate role to play in the interchange of ideas--as we conclude it does--then

government should have some measure of protection in performing that role, at least as to matters of public interest. Otherwise, if government is compelled to guarantee the truth of its factual *1267 assertions on matters of public interest, its speech would be substantially inhibited, and the citizenry would be less informed. Thus, it is appropriate to extend the limited First Amendment protection of the New York Times standard to government speech, so that government may be held liable for defamation of a public official or public figure (i.e., in matters of public interest) only where there is knowledge of falsity or reckless disregard of the truth. This also maintains the balance of conditional privilege between criticism of government and criticism by government in the absence of statutory privileges and immunities.

Finally, regarding the point that extension of First Amendment protection to government is inconsistent with the notion that the constitution protects citizens from government rather than government from citizens, our best answer is that if the unfettered interchange of ideas is a central concern of the First Amendment, then application of the First Amendment to government speech in the context of limited protection from liability for defamation is entirely consistent with First Amendment dogma, in that it promotes government's contribution to the marketplace of ideas. Moreover, in California, where a public entity's tort liability is derivative of employee liability (Gov.Code, s 815.2; see ante, p. 192), our primary concern is with the extension of First Amendment protection not to the entity but to

the employee, who should not be treated as having relinquished the protection of the First Amendment by virtue of government employment.

We conclude that application of the New York Times standard of Constitutional malice to government defendants in defamation cases represents an appropriate accommodation of the three competing interests implicated in this context of government speech. [4]

We are not entirely on our own in reaching this conclusion. Professor Yudof views Hutchinson v. Proxmire (1979) 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 as pointing in **198 the same direction. (Yudof, supra, at p. 286.)

In Hutchinson, research scientist Ronald Hutchinson sued Senator William Proxmire and his

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[4]

Nadel and Denney suggest there are procedural due process implications to such application ofNew York Times, citing cases holding that government may not take administrative action which harms a person's reputation without affording notice and an opportunity to be heard. (E.g., Wisconsin v. Constantineau (1971) 400 U.S. 433, 436-437, 91 S.Ct. 507, 509-10, 27 L.Ed.2d 515.) Those cases are inapposite, however, as the challenged statements in the present case neither constituted nor were part of any administrative action.

legislative assistant for defamation after receiving Senator Proxmire's "Golden Fleece" award for wasteful government spending. The Court held that in describing the award to Hutchinson in newsletters and a press release, the defendants were not immune under the Speech or Debate *1268 Clause of the United States Constitution, which states that "for any speech or debate in either house," members of Congress "shall not be questioned in any other place" (U.S. Const., art. I, s 6), because the newsletters and press release were not essential to the deliberations of the Senate or part of the Senate's deliberative process. (Hutchinson v. Proxmire, supra, 443 U.S. at p. 130, 99 S.Ct. at p. 2686.)

The Court also held Hutchinson was not a public figure under the New York Times standard of Constitutional malice. (Id. at pp. 133-136, 99 S.Ct. at pp. 2687-89.) The Court said its conclusion that Hutchinson was not a public figure "makes it unnecessary" to decide "whether the New York Times standard can apply to an individual defendant rather than a media defendant." (Id. at pp. 133-134, fn. 16, 99 S.Ct. at p. 2687, fn. 16.) Nevertheless, the Court's careful consideration whether Hutchinson was in fact a public figure suggests that issue was pivotal, and a different result might well have obtained (i.e., no liability for defamation absent malice) had Hutchinson been a public figure.

Professor Yudof believes the decision in Hutchinson "goes a long way toward extending New York Times v. Sullivan to libel and slander by public

officials. Thus, certain types of objectionable speech by public officials may lead to damage recoveries by those injured, thereby serving the important function of limiting what government officers may say--particularly as they rely on the prestige of their official positions. On the other hand, 'vigorous debate on public issues' is not diminished by the drastic alternative of enjoining government and its officers from speaking out. The accommodation of the needs to promote and to circumscribe government expression reached in Hutchinson is both wise and workable." (Yudof, supra, at p. 286, fn. omitted.)

In light of the Supreme Court's express disclaimer of a decision whether New York Times applies to nonmedia defendants, we hesitate to ascribe as much significance to Hutchinson as does Professor Yudof. Nevertheless, we agree that application of the New York Times standard to government speech accommodates the competing needs both to promote and to circumscribe government expression, and is "wise and workable." (Yudof, supra, at p. 286.)

4. Conclusion

We are acutely mindful of the danger that government may abuse its power to speak. Events of the past few decades have demonstrated that government is quite capable of misleading the public and defaming its citizens. But we also perceive that government has a legitimate role to play in the interchange of ideas. In determining the extent to which government *1269 speech implicates the First

Amendment in the context of government liability for defamation, we are compelled to accommodate three competing interests--the First Amendment interest in promoting the unfettered interchange of ideas, the state interest in protecting citizens from the power of government to defame them, and the overarching constitutional interest in protecting citizens from government rather than government from its citizens--and to draw a line between government's legitimate expression of ideas and its abuse of the power to speak. We believe the New York Times standard of constitutional malice provides a fair and feasible measure for determining whether government has stepped over that line.

It remains only for us to decide whether the trial court correctly determined that Nadel and Denney were limited purpose public figures and failed to produce evidence of constitutional malice.

B. Public Figure Status

The court correctly ruled that Nadel and Denney were public figures by virtue of **199 having "thrust themselves to the forefront" of the People's Park controversy. (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 345, 94 S.Ct. at p. 3009.)

Nadel spoke publicly at city council meetings and demonstrations. He wrote a letter to the editor of a local newspaper and an "open letter" to the University and the city, and spoke to print media reporters who included his comments in articles about

People's Park. He also regularly staffed an "information table" on Sunday afternoons in the park. There can be no reasonable doubt that he thrust himself to the forefront of the controversy "in order to influence the resolution of the issues involved." (Ibid.; see Rudnick v. McMillan (1994) 25 Cal.App.4th 1183, 1190, 31 Cal.Rptr.2d 193 [public figure status where plaintiff approached publisher of one article and expressed concern over issue, and encouraged interest of writer of another article].) [5]

This conclusion is bolstered by Nadel's own comments in a letter he wrote to one of the regents after the University filed its lawsuit, in which he asserted, "We've gotten great local press, and I've been on 6 radio stations with 11 more scheduled. After radio then T.V. I will make my case throughout California." Public figures "usually enjoy significantly greater access to *1270 the channels of effective communication and hence have a more realistic opportunity to counteract false statements than

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Nadel points to numerous newspaper and magazine articles about the People's Park controversy in which he was not mentioned. The proper focus, however, is not on the degree of media attention he received, but his attempt "to influence the resolution of the public issues involved." (Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, 254, 208 Cal.Rptr. 137, 690 P.2d 610, fn. omitted.)

private individuals normally enjoy." (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 344, 94 S.Ct. at p. 3009.) By Nadel's own account, that characterization would certainly apply to him.

Denney seems to have been somewhat less prominent in the People's Park controversy, but she nevertheless thrust herself to its forefront. Like Nadel, she spoke publicly at city council meetings and at political and cultural events. She also invited publicity by participating in a press conference regarding an incident at a demonstration in which she was arrested. The court properly determined that both plaintiffs were limited purpose public figures.

C. Absence of Constitutional Malice

Likewise, the court correctly ruled that Nadel and Denney failed to produce evidence of constitutional malice.

There was no evidence the defendants knew their statements were false. The four individual defendants each asserted in declarations, without contradiction, that they believed at all times that the statements were true. Nor was there evidence of reckless disregard of the truth--i.e., that the defendants "in fact entertained serious doubts as to the truth" of their statements. (St. Amant v. Thompson (1968) 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262.) To the contrary, the evidence demonstrated reliance on information from reputable sources, and no reason to doubt the accuracy of that information, which relieves

a publisher of any obligation to investigate personally. (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 259, 208 Cal.Rptr. 137, 690 P.2d 610; Church of Scientology Intern. v. Daniels (4th Cir.1993) 992 F.2d 1329, 1334.)

The University, in support of its application for a TRO, presented declarations by University employees describing several acts of vandalism and battery by Nadel and Denney, including the following: On August 9, 1991, Denney threw thorn-stemmed roses into the volleyball court sand pit, and tried to kick a volleyball player but missed and kicked a University employee instead. On the weekend of August 10-11, 1991, Nadel and some others ripped down the volleyball nets, causing the nets to graze the face of a University employee. On September 28, 1991, Nadel, Denney and other protestors moved a portable toilet from park premises into a street. And on January 4, 1992, Nadel pushed a University employee who was removing a leaflet Nadel had posted on a lamp post.

*1271 More generally, the employees described Nadel and Denney as frequent participants **200 in the People's Park protests, which indisputably became violent and destructive.

In contrast, Nadel and Denney presented no evidence tending to show reckless disregard of the truth. Nadel merely asserted in a declaration, "At no time have I ever committed an act of unprovoked violence against any person in People's Park nor have I ever been accused in a court of law, or convicted of

any such act." (Emphasis added.) He did not disclaim acts of violence he would view as "provoked." Denney merely asserted generally in her declaration that she had never committed acts of "destruction of property or injury to persons" in People's Park. She did not disclaim the specific acts attributed to her by the University employees (though she characterized her attempt to kick one of the volleyball players as self-defense). Neither plaintiff showed any reason for the University to doubt the accuracy of its employees' reports.[6]

In short, the University employees' reports of specific acts of vandalism and battery by Nadel and Denney, along with the plaintiffs' general immersion in a cause which degenerated into destruction and rioting, were grounds for reliance by the defendants in characterizing the plaintiffs as perpetrators of violence and destruction of property. Those characterizations might have been untrue, or at least exaggerated, but their support in the record precludes any

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[6] Nadel and Denney contend there was evidence of "ill-will," consisting of Vice-Chancellor Boggan's purported statement to an attorney that "[w]e got to wipe those guys out" with the University's lawsuit "because they are organizing against us" at a nightclub owned by Nadel. This was not, however, evidence of constitutional malice, but only common law malice. (See ante, fn. 1.)

determination that they were asserted with reckless disregard as to their truth. The court properly concluded there was no evidence of constitutional malice.

IV. DISPOSITION

The judgment is affirmed.

PETERSON, P.J., and HANING, J., concur.

FILED DEC 22 1994

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

DAVID NADEL Et Al., Appellants

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET Al., Respondents

Petition for review DENIED.

LUCAS
CHIEF JUSTICE

Following are texts of the statements made by the respondents:

STATEMENT OF MILTON FUJII

"These are the folks who have shown a repeated pattern of violent or destructive actions. . . (Daily Californian. January 27, 1992.

STATEMENTS OF DANIEL BOGGAN, JR.

On January 10, 1992, Boggan published a statement entitled "STATEMENT BY VICE CHANCELLOR DANIEL BOGGAN, JR., CONCERNING LEGAL ACTION AGAINST PERPETRATORS OF PEOPLE'S PARK VIOLENCE", in which he stated:

a. "[These individuals have] maliciously endangered public safety through continuing acts of violence intended to destroy University property and injure or intimidate people who use University facilities."

b."This small band of individuals, dissatisfied with the current plans for People's Park, are using fear and violence in an attempt to impose their will on the community."

c. [T]hese individuals intend to hold the campus and the community hostage, demanding the power to dictate public policy to everyone else."

In February, 1992, Boggan told the Bay Guardian that they "have stated that their goal is to sabotage the University facilities at People's Park. These individuals intend to hold the campus and the community hostage, demanding power to dictate public policy to everyone else."

In April, 1992, Boggan told the Berkeleyan:

"[A] few individuals have committed themselves to obstructing, through sometimes violent and destructive tactics, every attempt by the University and the city to restore a healthy environment at [People's Park]."

"[They] have continually shown wanton disregard for other people's rights and well-being [and] pose a serious threat to public safety that cannot be ignored."

"These individuals have at times been joined in acts of mob violence by opportunists seeking excitement or the spoils of looting".

On or about July 9, 1992, Boggan sent a letter to Dr. Agi E. Ban in which he stated: "These individuals stated that their goal was to sabotage University facilities at People's Park and to undermine the agreement between the University and the City.... Unable to alter the consensus through debate and reasoned discourse, they resorted to the use of fear and violence to impose their will on the community."

STATEMENTS OF CHRISTINE HELWICK

In March, 1992, Helwick, stated to a journalist of the East Bay Express that they "have a history of violent conduct."

In June, 1992, Helwick stated to a journalist of the San Francisco Weekly that they had undertaken "a deliberate, violent campaign to hinder the University's ability to transition this property into a park."

STATEMENTS OF JESUS MENA

On January 10, 1992, Mena distributed a circular to the general public and members of the press in which he made the following statements:

a. They have engaged in a "campaign of destruction and violence directed against University of California at Berkeley facilities, students, and employees - - as well as park and community users".

b. They "have repeatedly issued public statements threatening a guerilla campaign of attrition and retribution. . . and monkey wrenching of tools and equipment".

On March 25, 1992, Mena distributed a circular to the general public and members of the press in which he made the following statements:

a. They "have committed themselves to obstructing,

through sometimes violent and destructive tactics, every attempt by the University and the City [of Berkeley] to restore a healthy environment at the park."

b. They "have continually shown wanton disregard for other people's rights and well-being [and] pose a serious threat to public safety that cannot be ignored."

c. They are "perpetrators of violent and destructive acts [in People's Park]."

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No. 95-426

In the

Supreme Court of the United States

October Term, 1995

Carol Ruth Denney,

Petitioner,

vs.

The Regents of the University of California, et al.,

Respondents.

On Petition For Writ of Certiorari
To The California Court of Appeal
First Appellate District, Division Five

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Given the First Amendment interest in the free exchange of ideas, the reputational interests of public-figure plaintiffs, and the supposed potential for abuse of government power, are government officials who are sued for defamation by limited purpose public figures entitled to the protection of the "constitutional malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), which precludes liability for defamatory statements concerning a public figure unless they are made with knowledge of their falsity or reckless disregard of the truth?

LIST OF PARTIES

Petitioner's list of parties is correct except that, in addition to the parties listed, David Nadel was also an appellant in the California Court of Appeal, First Appellate District, Division Five, the court whose judgment is sought to be reviewed. S.Ct.R. 14.1(b).

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No. 95-426

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On Petition For Writ of Certiorari
To The California Court of Appeal
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RESPONDENTS' BRIEF IN OPPOSITION

ADDITIONAL PERTINENT STATUTORY PROVISIONS

In addition to the First Amendment of the United States Constitution, the following statutory provisions, which are set forth in pertinent part in the Appendix to this Brief, are discussed in the Petition and in this Brief in Opposition:

California Business and Professions Code Sections 335(b), (c)
California Civil Code Section 47(a)
California Civil Code Section 47(b)
California Civil Code Section 3294
California Government Code Section 815.2
California Government Code Section 820.2

COUNTERSTATEMENT OF THE CASE

Respondents here are the Regents of the University of California and four current and former University officials: University of California Berkeley Vice Chancellor Daniel Boggan, University of California Berkeley Director of Community Affairs Milton Fujii, University of California Berkeley Director of Public Information Jesus Mena, and Managing Counsel Christine Helwick (collectively "the University"). Petitioner was a leader of the highly visible and sometimes violent group that has opposed the University's and the City of Berkeley's plans to develop volleyball courts and other recreational improvements in People's Park, a 2.8 acre site south of the Berkeley campus. After the University officials made public statements explaining why the University obtained a temporary restraining order to stop petitioner and others from (1) vandalizing park property, (2) intimidating Park patrons and University employees, and (3) interfering with construction, petitioner and another group leader sued the University and the officials for defamation.

The trial court found that petitioner was a limited purpose public figure and, because she could offer no evidence that the supposed defamatory statements were published with constitutional malice, granted the University summary

judgment. (Pet. App. at 1-2[1]) The court also rejected petitioner's claim that the First Amendment applies only to governmental dissenters, not to the government or its officials like the University and the individual defendants here. (Pet. App. at 2-3) The Court of Appeal affirmed in a detailed opinion, the bulk of which discussed and then rejected petitioner's claim that governmental defamation defendants are not entitled to First Amendment protections. (Pet. App. at 4-37) The California Supreme Court unanimously denied review. (Pet. App. at 38)

The Court of Appeal's opinion correctly states the background facts [Pet. App. at 5-10], and the University adopts that statement as its own.[2]

REASONS FOR DENYING THE PETITION

A. The Lower Courts Are Not In Conflict Over Whether The First Amendment Applies To Governmental Speakers And That Issue Is Not Of Such Importance That This Court's Intervention Is Necessary[3]

Beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964), through *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974),

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[1] Throughout this Brief, the University uses the following abbreviations: "Pet." denotes the Petition for Certiorari; "Pet. App." denotes the Appendix to the Petition for Certiorari; "App." denotes the Appendix to this Brief in Opposition. Citations to the Court of Appeal's opinion here are to the pages in Petitioner's Appendix rather than to the published version at 28 Cal. App. 4th 1251 and 34 Cal. Rptr. 2d 188.

[2] Petitioner's statement of the case contains numerous supposed background facts that the record does not support. (Pet. at 2-3) The Court should disregard these unsupported statements.

[3] It is important to clarify the narrowness of the question that is before the Court. Despite petitioner's suggestion to the contrary

and most recently in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), this Court has held firmly to the view that to prevail in a defamation action, a public official or public figure must plead and prove "constitutional malice" — that the defendant made the challenged statement with knowledge that it was false or with reckless disregard for its falsity.[4] This rule promotes the unfettered exchange of ideas on which a democracy thrives and ensures that freedom of expression will enjoy the "'breathing space'" that it requires. *New York Times*, 376 U.S. at 269, 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Petitioner is unable to identify any conflict among the lower courts nor any lack of clarity over whether the *New York Times* standard applies to government defamation defendants. That is because there is none. Courts (including this one) have resoundingly rejected the notion that the value

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[Pet. at 11], there is no issue about whether the Court of Appeal correctly determined that petitioner was a limited purpose public figure. Petitioner did not seek review of that determination in the California Supreme Court, nor does she raise that issue in the "Questions Presented" section of her petition. (*See* Pet. at i). Similarly, petitioner does not seek review of whether she presented clear and convincing evidence of constitutional malice to create a triable factual issue necessary to defeat summary judgment. *See* S.Ct.R. 14.1(a). Finally, although petitioner alludes to the University's lawsuit against her and others [Pet. at 10], she raises no claim as to any issue arising from that action.

[4] The University uses the term "constitutional malice" to describe the *New York Times* standard and to distinguish it from common law malice or malice sometimes required by statute. *See Masson*, 501 U.S. at 510-11; *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974); *see also* Cal. Civ. Code § 3294 (c)(1) ("malice" finding required for punitive damages award).

of speech — and thus the availability of First Amendment defenses in defamation actions — depends on the speaker's identity or status. *E.g., First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source"); *Miller v. Nestande,* 192 Cal. App. 3d 191, 198 (1987) (applicability of *New York Times* constitutional malice standard does not depend on the media or non-media status of the defendant).

Indeed, Justice Brennan noted a decade ago that a majority of justices of this Court were in agreement that there is no distinction between the protections given media and non-media defendants under *New York Times. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 783-84 (1985) (diss. opn. of Brennan, J.). A majority of state and federal courts are in accord. *See* Annotation, *Defamation: Application Of New York Times And Related Standards To Non-Media Defendants,* 38 A.L.R. 4th 1114, 1119 (1985), and cases cited; *see also* Pet. App. at 15-16 and cases cited; *cf. Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 779 n.4 (1986) (leaving open applicability of burden of proof rule in defamation cases against non-media defendants).

In spite of this near unanimity, petitioner suggests that the question presented is worthy of review because only two lower court decisions [*Anderson v. Low Rent Housing Comm'n,* 304 N.W.2d 239, 247 (Iowa), *cert. denied,* 454 U.S. 1086 (1981), and *McDowell v. Paiewonsky,* 769 F.2d 942, 951 (3d. Cir. 1985)] have ever applied the constitutional malice standard to government defamation defendants. (Pet. at 13, n.8) This is untrue. Several lower courts (in addition to *Anderson* and *McDowell*) have ruled in favor of government defendants where public figure or public official plaintiffs failed to present sufficient evidence or allegations of constitutional mal-

ice.[5] In other cases, government defendants raised a constitutional malice defense but were held liable because the plaintiffs carried their burden of proving constitutional malice.[6] Indeed, even this Court has applied the constitutional malice standard in a case involving a government defendant, while expressly reserving the question whether the standard applies to an individual rather than a media defendant. *Hutchinson v. Proxmire*, 443 U.S. 111, 133-36 & n.16 (1979) (sci-

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[5] In *Anderson*, 304 N.W.2d at 245-47, the Iowa Supreme Court held that a former city employee who had sued a City commission and one commissioner for libel was a public figure who had to establish *New York Times* malice by clear and convincing evidence even though the defendants were "non-media." In *McDowell*, 769 F.2d at 949-51, the Third Circuit held that an architect who had sued a Virgin Islands leglislator for defamation was a public figure but that he had not proven constitutional malice. Many other decisions involving governmental defamation defendants have reached the same conclusions, applying the *New York Times* standard without hesitation. *E.g., Rattray v. City of National City*, 51 F.3d 793, 800-01 (9th Cir. 1994) (affirming order granting new trial where jury had awarded plaintiff police officer $300,000 in damages against city, police department, and police chief), *cert. denied*, --S. Ct.--, 1995 WL 380631 (1995); *Beard v. Baum*, 796 P.2d 1344, 1353-54 (Alaska 1990) (affirming summary judgment in favor of the State of Alaska and Alaska Department of Transportation officials, in action by a former Department employee); *Britton v. Koep*, 470 N.W.2d 518, 524-25 (Minn. 1991) (reversing Court of Appeal and reinstating summary judgment for a county and county commissioner, in action by a county probation officer); *Hirman v. Rogers*, 257 N.W.2d 563, 567 (Minn. 1977) (reversing denial of JNOV and reversing judgment in favor of two former police officers and one former deputy sheriff in action against sheriff and county); *Huyen v. Driscoll*, 479 N.W.2d 76, 79 (Minn. App. 1991); (affirming judgment for a city and a commissioner in action by a former director of city human rights department); *Waterson v. Cleveland State Univ.*, 639 N.E.2d 1236, 1239-40 (Ohio App. 1994) (affirming judgment in favor of a state university and against deputy chief of campus police); *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 667-68 (Ohio App. 1988) (affirming summary

entist who sued Senator Proxmire after receiving "Golden Fleece" award for waste in government was not a "public figure" required to prove constitutional malice).

While none of these cases expressly addressed the question presented here — whether government officials sued were entitled to rely on a constitutional malice defense — that is a reason to deny certiorari, not grant it. That the courts in these cases applied the defense to government officials without even blinking shows that they were not troubled with the concept of its applicability in this context. Here, while the Court of Appeal took pains to explain why it is appropriate for courts everywhere to apply the defense to government officials, its decision does not warrant this Court's attention unless it is wrong on the policy or the law. As the University explains below, plaintiff cannot show that it is. For that reason alone, this case presents no important federal question and the petition should be denied. S.Ct.R. 10.1(b) & (c).

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judgment against teacher in action against city school board and individual board member); *Sidor v. Public Disclosure Comm'n*, 607 P.2d 859, 863 (Wash. App. 1980) (affirming dismissal for failure to state a claim of plaintiff candidate's complaint against commission, individual commissioners, and state of Washington); *see also City Firefighers Union, Local 28 v. Duci*, 428 N.Y.S.2d 772, 775-76 (N.Y. Sup. 1976) (dismissing complaint in action by officials of firefighters' and patrolmen's unions against mayor on grounds that, among other things, plaintiffs were public figures who failed to allege malice).

[6] *E.g., Starkins v. Bateman*, 724 P.2d 1206, 1209-12 (Ariz. Ct. App. 1986) (affirming denial of JNOV and affirming jury verdict for former city fire department captain against firefighters and a city); *Blessum v. Howard County Bd. of Supervisors*, 295 N.W.2d 836, 842-44 (Iowa 1980) (affirming judgment in favor of plaintiff, a former county engineer, against county supervisor, where evidence of constitutional malice was sufficient to go to jury).

B. The Court Of Appeal Correctly Decided The Issue Presented

The Court of Appeal identified three competing interests implicated by petitioner's defamation claim against the University: (1) promoting government's contribution to the unfettered exchange of ideas, (2) the reputational interests of plaintiffs, and (3) the potential for government abuse of its power. (Pet. App. at 18) The Court of Appeal then weighed these interests and found that giving *New York Times* protection to governmental defendants like the University strikes an appropriate balance.[7] As we discuss, that decision was correct both in result and reason, and provides no basis for review.

1. The Court Of Appeal Considered The Reputational And First Amendment Interests At Issue And Correctly Held That Application Of The *New York Times* Standard Properly Balances Those Interests

Courts and commentators acknowledge that the government has a legitimate role to play in the "marketplace of ideas." *E.g., Miller v. California Comm'n on the Status of Women,* 151 Cal. App. 3d 693, 701 (Cal. Ct. App.)

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[7] The Court of Appeal was careful to note that its decision applies only to suits against government officials in their official capacities and consequently to the derivative liability of the government employer. (Pet. App. at 12-13; *see* Cal. Gov't Code § 815.2) Because all of the individual defendants here were acting in their official capacities when they made the challenged statements, this case does not involve whether *New York Times* protection should be given to a government employee acting outside the scope of an official capacity even if the employee lacks such protection when acting within that scope.

("`Government has legitimate interests in informing, in educating, and in persuading,'"quoting Steven Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565, 606 (1980)), *appeal dismissed*, 469 U.S. 806 (1984); Laurence H. Tribe, *American Constitutional Law*, at 807 (2d ed. 1988) (Government may "add its own voice to the many that it must tolerate, provided it does not drown out private communication"). That is not surprising, because government is often the sounding board for or the origin of many ideas that are being considered for adoption as policy.

The Court of Appeal here recognized government's valuable contribution to the unfettered exchange of ideas that is the hallmark of a democratic society. (Pet. App. at 18-22) Petitioner asserts, however, that the Court of Appeal gave too much weight to that interest while giving too little weight to the interest in protecting the reputations of plaintiffs from supposed governmental abuse of its power to defame. She suggests that a better balance would be achieved by holding government officials liable when they negligently defame public figures. She claims that such a rule is necessary because government speech is uniquely powerful and "vulnerable citizens" thus need a stricter standard than *New York Times* to protect them from the "excesses of government speech." (Pet. at 13-14, 18-19) But petitioner's argument proceeds from an unsound premise to an erroneous conclusion.

First, the notion that government speech is more powerful in its ability to influence the public than other speech is unproven and has even been the subject of criticism. Frederick Schauer, *Is Government Speech A Problem?*, 35 Stanford L. Rev. 373, 376-77, 382 (1983) (noting that social science literature regarding the effects of government speech on the populace is inconclusive). Indeed, as the Court of Appeal

recognized, because of general public dissatisfaction with and skepticism of government, the public may be "`strongly disposed to *disbelie[ve]*'" government speakers. (Pet. App. at 24, quoting Schauer, *supra*, at 381, emphasis added). Further, there is little reason to believe that government speech is particularly influential, given the pervasiveness of various communications media and the willingness of many to criticize the government. *See* Schauer, *supra*, at 380 ("The issues raised when the state is the *only* voice are significantly different from those raised when the state is one of many voices, especially when those voices are unrestrained both in law and in fact"). Indeed, the "big media's" voice may be just as powerful — if not more powerful — than government's. (Pet. App. at 24, citing Tribe, *supra*, at 809, n.16)

Petitioner's premise also presupposes that the public is easily duped into swallowing any ideology or point of view that the government dishes out. As last November's midterm elections make clear, the public is hardly that gullible. *See also* Schauer, *supra*, at 382 (there is "no reason to assume that the collective judgment [of the people] cannot appreciate government speech for what it is, in light of its source"). Yet it is precisely this paternalistic assumption about the public's ability to evaluate government speech on which petitioner's argument rests.

Even accepting (as the Court of Appeal did here [Pet. App. at 24]) that government may have unique powers of persuasion, it hardly follows that a governmental official should be liable for mere negligent false assertions about a public figure while all other defamation defendants who make such assertions enjoy *New York Times* protection. By her own account, petitioner is concerned not with the government's power but with its *abuse*. (See Pet. at 10-11, 14, 20) Yet that abuse is precisely what the *New York Times* standard

is designed to ferret out and punish, by requiring clear and convincing evidence that the defendant knew an allegedly defamatory statement was false or recklessly disregarded its truth. *New York Times*, 376 U.S. at 279-80.

The Court of Appeal recognized that the *New York Times* standard strikes a proper balance by adequately protecting the deliberately or recklessly defamed while at the same time ensuring vigorous public debate. (Pet. App. at 27-31) That Court was "acutely mindful of the danger that the government might abuse" its power and that the Court must "draw a line between government's legitimate expression of ideas and its abuse of the power to speak." (Pet. App. at 31-32) However, it reasoned that the "'drastic alternative of enjoining government and its officers from speaking out'" serves no one. (See Pet. App. at 31, quoting Mark G. Yudof, *When Government Speaks: Politics, Law and Government Expression in America*, at 286 (fn. omitted) (1983)). That is a sound conclusion which this Court need not revisit.

Indeed, no court that the University is aware of has adopted the drastic alternative that petitioner wants this Court to embrace. Nor does petitioner identify any potential "abuses" of government power — aside from deliberate or reckless falsehoods — that she believes a negligence standard would protect against. Petitioner complains of a "government-sponsored character assassination campaign." (Pet. at 20) But if petitioner had evidence to back up that complaint, that evidence could have subjected the University to liability under *New York Times*. Her problem is that she had none, either when she filed her lawsuit or when she was called upon during the summary judgment proceeding to produce it. And, if petitioner's real concern is with lawsuits such as the University's lawsuit against her [*see* Pet. at 10], surely there are other appropriate vehicles for dealing with

this supposed "misuse" of government power; a countersuit for defamation is not the answer. In short, no conceivable purpose would be served by petitioner's proposed rule.

Petitioner's apparent justification for denying government speakers *New York Times* protection is that the First Amendment was intended to protect the people from government, not the other way around. (See Pet. at 10, 21) The Court of Appeal recognized this "overarching principle" of constitutional theory, but found that applying *New York Times* to government defendants was consistent with competing First Amendment principles because doing so promotes government's contribution to the marketplace of ideas. (Pet. App. at 25-28, 31-32) The Court's primary concern was with protecting individual government employees rather than the governmental entity for which they work, particularly because the latter's liability is solely derivative. (Pet. App. at 28-29) Neither of these conclusions was erroneous and neither requires this Court's intervention.[8]

Moreover, petitioner's theory proves too much. If the purpose of the First Amendment is only to protect individuals from the government, then that principle should arguably apply to other provisions of the Bill of Rights, which the government should be barred from invoking. But the law is to the contrary. *See, e.g., Standard Oil Co. v. Arizona*, 738 F.2d 1021, 1026-30 (9th Cir. 1984) (states have Seventh

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[8] Both petitioner and the Court of Appeal cite Justice Stewart's concurring opinion in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973), for the proposition that the First Amendment does not protect government. (Pet. at 21; Pet. App. at 26) *Columbia Broadcasting* was not a defamation case; rather, it concerned whether broadcasters could be forced to accept paid political advertising. The majority acknowledged that regulation of broadcast media "pose[s] unique and special problems not

Amendment right to jury trial in antitrust actions), *cert. denied*, 469 U.S. 1132 (1985); *California v. United States*, 395 F.2d 261, 263 (9th Cir. 1968) (state governments have Fifth Amendment right to just compensation for taking of property); *see also Singer v. United States*, 380 U.S. 24, 36 (1965) (Government has right to jury trial even if criminal defendant has waived it).[9]

The Court of Appeal correctly balanced the interests and properly held that the University is entitled to *New York Times* protection. Petitioner presents no compelling reason for this Court to revisit or question its decision.

2. None Of Petitioner's Remaining Arguments Has Merit

Petitioner attacks the Court of Appeal's opinion on a number of additional points. None of her contentions warrants this Court's plenary attention.

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present in the traditional free speech case." *Id.* Further, Justice Stewart qualified the broad statement in the text in a footnote, where he noted that "[g]overnment is not *restrained* by the First Amendment from controlling its own expression." *Id.* at 139, n.7 (emphasis added). That the government is free to censor itself does not mean that it may be forced to control its expression through imposition of liability for defamation.

[9] Petitioner points out this Court's statement that the equal protection and privileges and immunities clauses "protect people, not states." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); Pet. at 21. But that merely illustrates that the applicability of a particular constitutional protection to government entities should be determined on a case by case basis. Moreover, that unelaborated statement in a per curiam opinion does not mean that First Amendment protections are unavailable to government officials (who are also "people") or to the states when their liability is vicarious.

Petitioner first asserts that government officials do not need constitutional protection, as government's "informing" function is adequately protected by statutory and common law official duty privileges. (Pet. at 15-17) But as the Court of Appeal recognized, there is no inconsistency in giving government speakers the protection of these privileges *and* the *New York Times* defense. (*See* Pet. App. at 21-22, 24-25, 27)

Official duty privileges such as those in California Civil Code section 47(a) and the federal Constitution's Speech or Debate Clause [art. I § 6] generally give absolute protection from liability for a very narrow class of speech. *E.g., Hutchinson,* 443 U.S. at 130-33 (Senator's speech on Senate floor critical of scientist's research is protected by Speech or Debate Clause, but dissemination to public through press releases and newsletters is not); *Sanborn v. Chronicle Publishing Co.,* 18 Cal. 3d 406, 412-13, 415 (1976) (Cal. Civ. Code § 47(a) privilege protects only policymaking decisions, not their operational implementation, so that statement to press is not protected). Similarly, the privilege in California Government Code section 820.2 grants immunity for a narrow range of discretionary, policy-making functions. Its applicability in a defamation suit is similar — if not identical — to that of California Civil Code section 47(a). *Sanborn,* 18 Cal. 3d at 412-16; *see Susan A. v. County of Sonoma,* 2 Cal. App. 4th 88, 97 (1991); *Toney v. State,* 54 Cal. App. 3d 779, 792-93 (1976). In contrast, the *New York Times* standard gives only conditional protection to a very broad range of speech.[10]

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[10] California Civil Code section 47(b), which petitioner also cites as a potential source of statutory protection for government speech [Pet. at 16], makes privileged any publication or broadcast made in a legislative, judicial, or other official proceeding. Often called the "litigation privilege," the statute's purpose is to afford litigants and witnesses the utmost freedom of access to the courts.

Moreover, official duty privileges and the *New York Times* defense serve very different purposes. Official duty privileges enhance the effective administration of government, while the *New York Times* defense serves the broader First Amendment goal of encouraging the unfettered exchange of ideas. But that does not mean that government's only legitimate interest in a defamation action against it is the interest in effective administration and that only government speech that is protected by a statutory or constitutional "official duty" privilege deserves protection. (*See* Pet. at 16-17)

Indeed, many instances of legitimate government speech are not protected by an official duty privilege. This case is a prime example. The University made the challenged statements here to explain why it took the unusual step of seeking an injunction to halt destruction of property, intimidation and violence that was occurring over the construction of the People's Park volleyball courts. The public had a legitimate interest in hearing the University's side of the story, and the University had an equally legitimate interest — if not a duty — in giving the public a full explanation so it could evaluate the University's actions. Yet, denying *New York Times* protection to government actors would inhibit government from discharging its vital role of informing the public and participating in public debate — an activity that is

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Silberg v. Anderson, 50 Cal. 3d 205, 213 (1990). For judicial proceedings, the privilege applies where the statement is made: (1) in a judicial proceeding; (2) by litigants or other authorized participants; (3) to achieve the objects of the litigation; and (4) having some connection or logical relation to the action. *Id.* at 212. While the sweep of the privilege is broad, it does not include statements to the press by a participant in the litigation. *Shahvar v. Superior Court*, 25 Cal. App. 4th 653, 658-59 (1994); *Susan A.*, 2 Cal. App. 4th at 93-95.

legitimate but perhaps unprotected by an official duty privilege. The Court of Appeal recognized the "chilling effect" such a rule might have [Pet. App. at 20-21, 27-28], noting, for example, that the Director of the Department of Consumer Affairs might be inhibited from informing the public about consumer fraud due to the defrauding entity's threat of a defamation action. *See* Cal. Bus. & Prof. Code § 335(b), (c). Petitioner takes issue with that statement, contending that the Director would "certainly" enjoy the privilege of California Civil Code section 47(a). (Pet. at 17, n.11) But *Sanborn, Toney* and other official duty privilege cases [*see* discussion *supra*, at 14] suggest that while the *Director* might be protected for a "policymaking" decision to give information to the public, lower-level employees who implement that policy might not be.

Thus, the Court of Appeal was properly concerned with the inhibitory effects of defamation actions on the "information-disseminating" function of government. For example, if the University officials here were held to a mere negligence standard for explaining why they took legal action against petitioner and others, they might have declined to say anything, or at best may have made an extremely guarded explanation. That would not have satisfied the public's desire to know, nor would it have helped the public make an informed evaluation of the University's conduct on a well-publicized issue of public importance.[11]

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[11] To support her claim that the constitutional malice standard was never meant to protect government speakers, petitioner points to *New York Times's* language to the effect that heightened protection for speech about public figures is necessary to place non-governmental critics on equal footing with the officials they criticize. Such "equal footing" is necessary because governmental officials may invoke the official duty privilege as a defense. (Pet. at 17,

Petitioner next asserts that the "heightened vulnerability to government defamation of even a public figure plaintiff" requires a mere negligence rule for government defendants who speak in their official capacities. (Pet. at 18) She suggests that such a rule would help correct a perceived "credibility" problem that government has with the public and would promote accuracy in government speech and restore public confidence in government. (Pet. at 19) But petitioner never explains how exposing government entities to greater defamation liability would restore public confidence. To the contrary, a greater number of defamation verdicts against government defendants and the consequent drain on the public fisc would likely have the opposite effect.

Moreover, there is little evidence to suggest that use of the *New York Times* standard will encourage government officials to "bask in self-serving ignorance," as petitioner suggests. (Pet. at 19-20) Rather, as the Court of Appeal pointed out, the threat of *any* defamation liability is a sufficient check on the abuse of government power [Pet. App. at 27], and thus an adequate incentive toward accuracy in government speech. Further, government has additional built-in incen-

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n.11); *New York Times*, 376 U.S. at 282-83. But as the Court of Appeal here recognized, that "constitutional tit-for-tat" would be absent where, as here, the government defendant does *not* enjoy the protection of statutory privileges or immunities. (Pet. App. at 21) Moreover, requiring public *figures* to prove constitutional malice has nothing to do with the need to place non-governmental defamation *defendants* on equal footing with the government. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153-55 (1967). The public figure plaintiff — if he or she were the defendant — could not invoke an official duty privilege. *Id.* at 154. Rather, requiring such proof of public figures is necessary because, as individuals who attempt to influence the government, public figures' conduct warrants heightened scrutiny. *Id.* at 148.

tives to maintain accuracy in the information it disseminates — not the least of which is accountability at the ballot box.

Most importantly, petitioner forgets that the *New York Times* standard did not arise from a need to promote accuracy, but to encourage vigorous debate about public figures who, like petitioner, have thrust themselves to the forefront of a particular controversy. *Gertz*, 418 U.S. at 345, 351. As this Court has made clear, the *New York Times* defense applies in such cases because "'criticism of private citizens who seek to lead in the determination of . . . policy'" is as important to the public interest as criticism of government officials. *Id.* at 148 (quoting *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188, 196 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967)). That is because, like public officials, public figures "often play an influential role in ordering society," and "[t]he fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct." *Id.* at 164 (Warren, C.J., concurring in the result). Accordingly, while petitioner's concerns about government credibility are laudable, requiring government defendants to pay damages in defamation suits by public figures is not the answer.[12]

Finally, petitioner asserts that if the Court of Appeal is concerned with the First Amendment rights of individual

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[12] Nor does application of the *New York Times* standard offend settled notions of "due process," as petitioner suggests. (Pet. 19, n.12) As the Court of Appeal found, petitioner's reliance on cases holding that governmental agencies must give a citizen notice and an opportunity to be heard before taking action that incidentally harms the citizen's reputation was misplaced. (*Id.*; Pet. App. at 29, n.4) After all, petitioner was not claiming that the harm to her rep-

government employees rather than those of government entities, then the answer is to apply the *New York Times* standard only when such officials speak as individuals rather than as representatives of the government. (Pet. at 20-22) Petitioner suggests that a government official need only announce that he or she is not speaking officially and that, under "traditional principles of agency law," the official would thereby be cloaked in the protection of the constitutional malice standard. (Pet. at 22) But even if this case presented the question of the standard to be applied when government employees speak in their individual capacities — which it does not [*see supra* at 8, n.7] — petitioner's standard is unwise and unworkable and would upset the delicate balance that this Court's First Amendment jurisprudence is designed to protect.

For one thing, the line petitioner wants the Court to draw between those governmental officials who may claim *New York Times* protection and those who may not is far too fuzzy. If petitioner is suggesting that not even low-level governmental employees are entitled to a *New York Times* defense when they speak in their official capacities, then one can imagine situations in which the First Amendment balance would be thrown totally off kilter. For example, should a Los Angeles County Superior Court deputy clerk be denied *New York Times* protection if Arnold Schwarzenegger sues the clerk for defamation after, in the performance of official

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utation sprung from any *administrative* action by the University. (Pet. App. at 29, n.4) Moreover, this Court has held that the interest in reputation *alone* is neither "liberty" nor "property" that the Due Process Clause protects. *Paul v. Davis*, 424 U.S. 693, 712 (1976) (distinguishing *Goss v. Lopez*, 419 U.S. 565 (1975), and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), because they both involved deprivation of some other interest besides reputation).

duties, the clerk mistakenly tells a local newspaper that the star appeared in court on a drunk driving charge? Surely Mr. Schwarzenegger has sufficient access to the media to counter such a statement. *See Gertz*, 418 U.S. at 344. Yet, under petitioner's formulation, the court employee would be stripped of *New York Times* protection merely because he or she works for a public agency.

Moreover, a rule allowing a government speaker to invoke the constitutional protection merely by a talismanic incantation of the words "I'm only speaking for myself" borders on the absurd. Petitioner has not shown how the purported evils of government speech she identifies — such as government officials' supposedly superior power to persuade and defame — would be any lessened when the speaker purported to speak individually rather than for the government entity. Again, in this case, even if the University officials had prefaced their statements to the press with words such as "I'm only speaking for myself," it is doubtful that the supposedly harmful impact of the speech petitioner complains of would have been diminished.

Further, the determination whether a statement is made within the scope of a government official's employment — therefore subjecting the employer to vicarious liability — turns on many factors other than the employee's professed intent. *See, e.g., Sanborn*, 18 Cal. 3d at 411-12. The entire context of the statment must be examined, including an inquiry into whether it was made for the benefit of the employer. *Id.* If petitioner's aim is to deny *New York Times* protection to government entities, then it would seem anomalous to allow the employee to invoke the *New York Times* standard by chanting a magic phrase, as petitioner suggests, when that might not be enough to exonerate the government from vicarious liability for the statement.

If petitioner means to argue that the *New York Times* standard should apply only when the statements are not within the scope of employment and therefore the government is not vicariously liable, that would not resolve the problem of "relinquishment" of First Amendment rights by government employees that the Court of Appeal identified. (*See* Pet. App. at 27) Petitioner's formulation simply ignores the First Amendment values that are promoted when *New York Times* protection is accorded to official speech. (*See* discussion, *supra*, at 8-9, 15-16). Accordingly, petitioner's proposed rule would upset settled notions of defamation law, and this Court should decline to embrace it.

CONCLUSION

The First Amendment concern for protecting the dissemination of competing opinions is no less important when those opinions emanate from government officials. To hold that the government is not entitled to the benefit of the *New York Times* standard when it engages in public debate about a public figure's activities would thus undermine the notion that "speech can rebut speech" and "free debate of ideas will result in the wisest government policies." *Dennis v. United States*, 341 U.S. 494, 503 (1951).

The law is not in conflict nor, after this case, is it unsettled. The Court of Appeal's opinion is thoughtfully reasoned, makes good law, and implements sound public policy. The petition accordingly presents no important question of federal law requiring this Court's intervention, and should be denied.

DATED: November 7, 1995

Respectfully submitted,

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APPENDIX A

CALIFORNIA BUSINESS & PROFESSIONS CODE
CONSUMER AFFAIRS

Chapter 4

§ 335. Dissemination

The director shall disseminate to the public in such form and manner as he deems most appropriate information, statistics, and other data concerning the following:

(a) ----------

(b) Commercial and trade practices which are detrimental to consumers.

(c) Goods and services which are unsafe, unhealthful or inimical to the general welfare of consumers.

APPENDIX B

CALIFORNIA CIVIL CODE

§ 47. Privileged publication or broadcast

A privileged publication or broadcast is one made:

(a) In the proper discharge of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this

paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Section 2031 of the Code of Civil Procedure.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies.

(4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

APPENDIX C

CALIFORNIA CIVIL CODE

§ 3294. Exemplary damages; when allowable; definitions

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) ----------

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintif or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

APPENDIX D

CALIFORNIA GOVERNMENT CODE

Public Entities and Employees

§ 815.2 Injuries by employee within scope of employment; immunity of employee

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

APPENDIX E

CALIFORNIA GOVERNMENT CODE

Public Entities and Employees

§ 820.2 Discretionary acts

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.